SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

NO. 73-1895

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

STATE OF TEXAS, STATE OF MISSOURI, STATE OF WISCONSIN, STATE OF OKLAHOMA, and STATE OF KANSAS, Petitioners

v.

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The States of Texas, Missouri, Wisconsin, Oklahoma and Kansas petition for a writ of certiorari to review the decision of the United States District Court for the Western District of Texas. Said decision has been appealed by the Respondent Administrator to the United States Court of Appeals for the Fifth Circuit and is now pending on the docket of that court. Written briefs and oral argument have been presented to the court of appeals, but that court has decided to withhold judgment on the merits pending this Court's decision in *Train v.*

City of New York (No. 73-1377) and *Train v. Campaign Clean Water* (No. 73-1378), certiorari granted April 29, 1974.

OPINIONS BELOW

The opinion of the district court (App. A) was entered on October 2, 1973, and is unreported. The court of appeals has not rendered judgment in this case.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Administrator, acting under the direction of the President, has discretion under the grant program of Title II of the Federal Water Pollution Control Act Amendments of 1972 to allot to the States under Section 205(a) less than the full amounts authorized by Section 207.

STATUTES INVOLVED

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. 1281, *et seq.* (1973 Supp.) provide:

> Sec. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the

Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

(b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment

of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

In October 1972, after more than two years of deliberation, Congress overwhelmingly passed a far-reaching water pollution control bill which had as its objective the restoration of the nation's waters to their natural state.[1] The heart of this ambitious undertaking was the commitment of vast amounts of federal funds to state and local governments to assist in the construction of sewage treatment plants. The Administration had opposed the bill because of the large sums of federal spending called for and because of the funding mechanism employed in the bill to ensure the availability of these sums. Consistent with that position, the President vetoed the bill, citing its inflationary nature.

[1] The bill, S.2770, 92d Cong., 2d Sess., was enacted as the Federal Water Pollution Control Act of 1972, P.L. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.* (Supp. 1973) (hereinafter referred to as the "Act").

When the vetoed bill was returned to the Congress, the principal spokesmen for the bill in both houses, while acknowledging the magnitude of the federal spending called for, reiterated the vital importance of cleansing this country's lakes and streams; the veto was overridden by decisive margins.

A month later, the President ordered the Administrator of the Environmental Protection Agency[2] to allot to the States only $5 billion of the $11 billion authorized by Congress for the first two fiscal years of the program's operation, thus seeking to accomplish by the controversial practice of impoundment[3] what he had failed to achieve in exercising his constitutional veto power.

The dramatic difference between the sums Petitioners received under the reduced allotment ordered by the President and the sums they would have received had full allotment been permitted is demonstrated in the following tables.

[2] Hereinafter referred to as the "Administrator". At the time the actions complained of herein took place and at the time this action was commenced, the Administrator was William D. Ruckelshaus. The present Administrator is Russell E. Train, the Respondent herein.

[3] As used herein, the term "impoundment" means any action of the Executive that prevents the allotment, obligation, or expenditure of funds authorized or appropriated by Congress.

Table 1: Full Allotments & Reduced Allotments for Fiscal Years 1973 and 1974

States' Percentage Share	FULL ALLOTMENT $5 Billion 1973	FULL ALLOTMENT $6 Billion 1974	REDUCED ALLOTMENT $2 Billion 1973	REDUCED ALLOTMENT $3 Billion 1974
Texas 2.7694%	$138,470,000	$165,744,000	$55,388,000	$83,082,000
Wisconsin 1.7415%	$ 87,075,000	$104,490,000	$34,830,000	$52,245,000
Missouri 1.6556%	$ 82,780,000	$ 99,336,000	$33,112,000	$49,668,000
Oklahoma .4608%	$ 23,040,000	$ 27,648,000	$ 9,216,000	$13,824,000
Kansas .3742%	$ 18,710,000	$ 22,452,000	$ 7,484,000	$11,226,000

Table 2: Summary of Total Allotments & Effect on States for Fiscal Years 1973 and 1974.

State	Total Reduced Allotment 1973 & 1974	Total Full Allotment 1973 & 1974	TOTAL AMOUNT WITHHELD
Texas	$138,470,000	$304,214,000	$165,744,000
Wisconsin	$ 87,075,000	$191,565,000	$104,490,000
Missouri	$ 82,780,000	$182,116,000	$ 99,336,000
Oklahoma	$ 23,040,000	$ 50,688,000	$ 27,648,000
Kansas	$ 18,710,000	$ 41,162,000	$ 22,452,000

As can be seen rather readily, the practical effect of the Administrator's action was to give to the States for fiscal years 1973 *and* 1974 what they should have re-

ceived for 1973 *alone*. In short, the States were effectively denied their fiscal 1974 allotment.

Petitioner State of Texas, joined by Petitioners Wisconsin, Missouri, Oklahoma and Kansas, filed suit in the United States District Court for the Western District of Texas, Austin Division, seeking judgment that the Administrator's $2 billion and $3 billion allotment for fiscal years 1973 and 1974 violated the Act, and an order compelling the Administrator to allot the full $5 billion and $6 billion authorized by the Act for those years.

Petitioners moved for summary judgment and the Administrator moved to dismiss, relying on the doctrines of "ripeness", sovereign immunity, and political question, and on the ground that Petitioners had failed to state a claim upon which relief could be granted.

On October 2, 1973, the district court entered its Memorandum and Order. In a thorough discussion of the issues, the court first disposed of the preliminary defenses raised by the Administrator, holding that the case was clearly ripe for judicial determination,[4] and that the doctrines of sovereign immunity and political question were inapplicable.[5] After careful analysis of the merits, the court declared that ". . . in light of the high priority placed by Congress on the Act, the language of the Act, and the legislative history of the Act,

[4] App. A at 18-19.

[5] App. A at 19-21.

this Court concludes that the Administrator has a mandatory duty to allot to the Plaintiffs the sums authorized by Congress in § 207 of the Act in accordance with § 205(a)".[6]

Accordingly, judgments were entered as to each of the Plaintiff States[7] which (a) denied the Administrator's motion to dismiss; (b) granted Plaintiffs' motion for summary judgment; (c) declared the $2 billion and $3 billion allotments unlawful under the Act; and (d) ordered the Administrator to allot to each of the Plaintiffs its share of the $5 billion and $6 billion required to be allotted for fiscal years 1973 and 1974.[8]

The Administrator appealed to the United States Court of Appeals for the Fifth Circuit and the case was docketed in that Court on January 9, 1974. On motion of the Administrator, the court of appeals granted a stay of the district court's order on January 28, 1974. Subsequently, briefs were submitted by the parties and oral argument was held before a panel of the court of appeals on April 29, 1974, the date upon which this Court

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[6] App. A at 24.

[7] Texas (App. B); Oklahoma (App. C); Wisconsin (App. D); Missouri (App. E); Kansas (App. F).

[8] Practically before the ink was dry on the district court's order disallowing the impoundment of 1973 and 1974 funds, the Administrator, on January 10, 1974, impounded $3 billion of the $7 billion authorized by the Act for fiscal year 1975. Texas has filed suit challenging this action. *State of Texas v. Train*, No. A 74 CA 004 (W.D. Tex., filed Jan. 14, 1974).

granted petitions for writ of certiorari in *Train v. City of New York* (73-1377) and *Train v. Campaign Clean Water* (73-1378).

During oral argument, the court of appeals indicated that it would stay the rendition of final judgment in the instant case until this Court rules in the *City of New York* and *Campaign Clean Water* cases. After oral argument, Petitioners moved for expedited judgment on the merits and to vacate the stay of the district court's order. On May 21, 1974, the court of appeals denied the motion for expedited judgment, but granted, effective June 5, 1974, the motion to vacate the stay. (App. G).[9] On May 28, 1974, the court of appeals informed counsel that ". . . the disposition of [the instant case] is being withheld pending decision of the Supreme Court in the cases *Train v. City of New York,* (73-1377), *Train v. Campaign Clean Water* (73-1378), certiorari granted April 29, 1974." (App. H)

REASONS FOR GRANTING THE WRIT

1. The issues in this case are essentially the same as those raised in the petitions for certiorari in *Train v.*

[9] The court of appeals had expressed concern during oral argument over the issue of whether the Administrator is authorized by the Act to allot at a later time the funds he is presently withholding. Specifically, the court's concern was that if it continued its stay of the district court's order and the Act did not authorize such later allotments, then the $3 billion the Administrator has refused to allot for fiscal year 1973 will be lost irretrievably at the close of the initial statutory period of availability, *i.e.*, June 30, 1974. Respondent has sought a renewal of the stay from this Court. (A-11-75) For the reasons stated in Petitioners response to that application for stay, Petitioners unequivocally oppose a further stay of the district court's order.

City of New York and *Train v. Campaign Clean Water.* In *City of New York,* the Administrator challenges the District of Columbia Circuit's holdings that the Act requires allotment of full amounts authorized by Congress to be appropriated, and that the case is not barred by the doctrine of sovereign immunity. In *Campaign Clean Water,* the Administrator raises, in addition to the sovereign immunity issue, the question of whether the Administrator's impoundment action is subject to judicial review. Similarly, in the instant case, the Administrator raised the sovereign immunity and "justiciability" issues in the district court; and in the court of appeals, the Administrator, while dropping the sovereign immunity argument, still insists that the case is not subject to judicial review. Under these circumstances, granting of certiorari prior to the judgment of the court of appeals would be entirely consistent with the past practice of this Court. See, e.g., *Turner v. City of Memphis,* 369 U.S. 350 (1962); *Taylor v. McElroy,* 360 U.S. 709 (1959); *Brown v. Board of Education of Topeka,* 344 U.S. 1 (1952); C. Wright, Federal Courts § 106, pp. 477-78 (1970).

2. Further, this case involves a question of "imperative public importance" within the meaning of Rule 20 of this Court. Respondent, at the insistence of the President, has, by the action complained of here, eviscerated the Act, frustrated the will of Congress, and perpetuated the defilement of the nation's waters by raw or inadequately treated municipal waste. And the legality of this sweeping action cannot be determined in a court

of law, Respondent contends, because such conduct by the Executive Branch is not governed by legally definable standards. The manifest importance of these issues to the public and to this nation's constitutional fabric does not require lengthy explanation.

3. Granting a writ of certiorari in the instant case would allow it to be joined with the *City of New York* and *Campaign Clean Water* cases for this Court's consideration. This, in turn, would greatly serve the interests of judicial economy, since the rights of the Petitioners could be finally resolved before this Court without the need for further proceedings in the court of appeals.

4. Moreover, the record in the instant case contains evidence on the impact of the Administrator's impoundment action on the States,[10] the political entities to which the duty of allotment is actually owed under the Act. This factual record would be of assistance to the Court in judging the important legal issues raised in this controversy.

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[10] Petitioners Texas, Wisconsin, and Missouri submitted sworn affidavits in support of their motions for summary judgment that showed that their waste treatment construction needs far exceed the paltry allotment made to them for fiscal years 1973 and 1974; that because of the reduced allotment presently identified, waste treatment projects will not receive the Administrator's consideration; and that the result is delay and postponement of needed pollution control facilities, continued deterioration of the States' waters, and a clear probability that the goals of the Act will not be achieved. These affidavits, undisputed by the Administrator, are reproduced in the printed appendix in the court of appeals at 23-35 (Texas); 61-70 (Wisconsin); and 86-89 (Missouri).

5. Finally, granting of certiorari would allow Petitioners to appear as parties before this Court and to secure, should the Court rule against the Administrator, a final and binding judgment enforceable against the Administrator. Otherwise, even if this Court should so rule, Petitioners face additional proceedings in the court of appeals and the possibility of an appeal to this Court, with the unnecessary cost and delay attendant thereto.

PRAYER

For the foregoing reasons, Petitioners respectfully pray that their petition for writ of certiorari be granted and that any further stay of the district court's order be denied.

Respectfully submitted,

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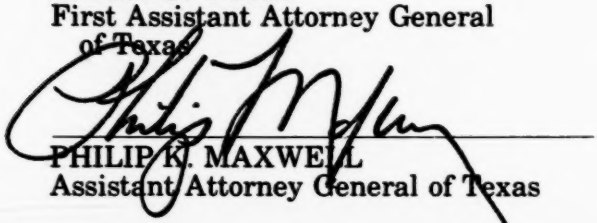

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